STATE OF MICHIGAN

COURT OF APPEALS

ROWLAND E. ROBINSON,

Plaintiff-Appellant,

v

ESTATE OF ELSIE TYLER, f/k/a CRYSTAL FOUNTAIN DRIVE INN,

Defendant-Appellee.

UNPUBLISHED
September 11, 2003

No. 242332
Mecosta Circuit Court
LC No. 01-014515-NO

Before: Meter, P.J., Talbot and Borrello, JJ.

PER CURIAM.

In this premises liability case, plaintiff appeals as of right the trial court's order granting summary disposition in defendant's favor under MCR 2.116(C)(10). We affirm.

We review a trial court's grant or denial of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition brought under MCR 2.116(C)(10) tests the factual support for a claim. *Downey v Charlevoix Co Bd of Co Rd Comm'rs*, 227 Mich App 621, 625; 576 NW2d 712 (1998). The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered by the court when ruling on a motion brought under MCR 2.116(C)(10). MCR 2.116(G)(5). When reviewing a decision on a motion for summary disposition under MCR 2.116(C)(10), this Court "must consider the documentary evidence presented to the trial court 'in the light most favorable to the nonmoving party.'" *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 538-539; 620 NW2d 836 (2001), quoting *Harts v Farmers Ins Exchange*, 461 Mich 1, 5; 597 NW2d 47 (1999).

This case arose after plaintiff, who is legally blind in both eyes, broke his leg and dislocated his knee after falling down a step at defendant's establishment. Plaintiff first argues that the trial court erred by failing to determine subjectively whether the danger posed by the step was open and obvious. According to plaintiff, whether the danger posed by the step was open and obvious should be determined by whether the average visually impaired person would discover the danger. We disagree.

In *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 518 n 2; 629 NW2d 384 (2001), our Supreme Court noted that, in determining whether a danger is open and obvious, "it is important to maintain the proper perspective, which is to consider the risk posed by the condition *a priori*,

that is, before the incident involved in a particular case." By focusing on the unsafe condition before a plaintiff is injured, the Supreme Court rejected any consideration of the "special aspects" of any particular plaintiff. Accordingly, the test to determine whether a danger is open and obvious is objective, not subjective. *Id*. at 524; *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002). Whether a danger is open and obvious depends "on the objective nature of the condition of the premises at issue, not on the subjective degree of care used by the plaintiff." *Lugo, supra* at 524.

Plaintiff next argues that the trial court erred in granting summary disposition on the grounds that the step was an open and obvious condition. We disagree.

Plaintiff was an invitee at defendant's restaurant because defendant's "premises were held open for a *commercial* purpose." *Stitt v Holland Abundant Life Fellowship,* 462 Mich 591, 604; 614 NW2d 88 (2000) (emphasis in original). "An invitee is entitled to the highest level of protection under premises liability law." *Id*. at 597. Generally, an invitor owes a duty to his invitees "to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo, supra* at 516. The duty does not extend to conditions from which an unreasonable risk cannot be anticipated or to dangers that are known to an invitee or are so obvious that an invitee can be expected to discover them himself. *Id.* at 516-517. An "open and obvious" danger is one that a person of ordinary intelligence would discover upon casual inspection. *Novotney v Burger King Corp (On Remand),* 198 Mich App 470, 475; 499 NW2d 379 (1993). However, even in the event that the danger is open and obvious, if "special aspects" of a condition make an open and obvious risk unreasonably dangerous, the possessor has a duty to take reasonable precautions to protect invitees from the risk. *Lugo, supra* at 517. "Only those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine." *Id.* at 519. "Typical open and obvious dangers . . . do not give rise to these special aspects." *Id.* at 520.

"The danger of tripping and falling on a step is generally open and obvious . . . ." *Bertrand v Alan Ford, Inc,* 449 Mich 606, 614; 537 NW2d 185 (1995). In addition, "the risk of harm from steps is presumptively reasonable." *Spagnuolo v Rudds #2, Inc,* 221 Mich App 358, 360; 561 NW2d 500 (1997), citing *Bertrand, supra* at 616-617. However, there may be special aspects about particular steps that make the risk of harm unreasonable. *Bertrand, supra* at 614. "Where there is something unusual about the steps, because of their 'character, location, or surrounding conditions, . . .' then the duty of the possessor of land to exercise reasonable care remains." *Id.* at 617, quoting *Garrett v WS Butterfield Theaters, Inc,* 261 Mich 262, 263-264; 246 NW 57 (1933). In this case, plaintiff fell backwards down one step that separated two hallways. Plaintiff contends there were "special aspects" about the step which preclude application of the open and obvious doctrine. Specifically, plaintiff argues that the step in this case had "special aspects" because plaintiff's vision was impaired, the area by the step was dimly lit, the step was located near the restaurant's handicapped entrance, and there were no warnings or handrails.

We conclude that the conditions of the step do not constitute "special aspects" as contemplated by the Supreme Court in *Lugo.* "Only those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided" will remove a condition from the open and obvious danger doctrine. *Lugo, supra* at 519. Examples of

conditions constituting "special aspects" include: (1) "an unguarded thirty foot deep pit in the middle of a parking lot" resulting in a fall of an extended distance and (2) standing water at the only exit of a commercial building resulting in the condition being unavoidable because no alternative route is available. *Id.* at 518.

In this case, the danger of falling down one step does not give rise to a uniquely high likelihood of harm or severity of harm. Accordingly, because the condition presented by the step did not involve an especially high likelihood of injury and there was little risk of severe harm, defendant's fall down one step does not constitute the type of "special aspects" contemplated by *Lugo. Lugo, supra* at 520; *Corey v Davenport College of Business (On Remand),* 251 Mich App 1, 7; 649 NW2d 392 (2002). Therefore, the trial court did not err in granting defendant's motion for summary disposition on the basis that the danger posed by the step was open and obvious.

Affirmed.

/s/ Patrick M. Meter
/s/ Michael J. Talbot
/s/ Stephen L. Borrello